

1 December 2017

ASIC Enforcement Review
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: ASICenforcementreview@treasury.gov.au

Dear Sir/Madam

ASIC'S DIRECTIONS POWERS

The Insurance Council of Australia (the Insurance Council) appreciates the opportunity to comment on the ASIC Enforcement Review Taskforce's (the Taskforce) Position and Consultation Paper 8, *ASIC's Directions Power* (the Consultation Paper). The Insurance Council recognises the importance of ASIC having sufficient powers to take timely action where there has been an identified compliance failure by an Australian Financial Services (AFS) licensee. A robust regulatory toolkit strengthens community confidence in the financial system.

However, we are concerned that the proposed directions powers will be the catalyst for a diminution in due process and procedural fairness, both of which are essential components of a fair, transparent and judicious regulatory regime. It is important that there is an appropriate balance struck between the ability of ASIC to take decisive action in enforcing the law, and procedural fairness to ensure that regulatory intervention is properly assessed before taken.

The Insurance Council also queries the proposed expansion of ASIC's powers when the final form of the impending product intervention powers is yet to take shape. The Taskforce indicates its intention is not to expand ASIC's powers in an inconsistent way or to undermine the limits that will be imposed on the use of the product intervention powers. However, as the Taskforce can appreciate, it is difficult to assess consistency or duplication of these powers when the product intervention powers have not yet been finalised.

If the Taskforce is minded to expand ASIC's powers as proposed ahead of the product intervention powers being finalised, we suggest that the directions powers are targeted and tightly defined in the legislation (and not regulations). These powers should only apply to serious (not technical or minor) contraventions of the law that are actual (not "proposed" contraventions).

Given the impact that a direction could have on a licensee, the Insurance Council strongly recommends that powers incorporate robust procedural fairness measures. Such measures

should enable a licensee to challenge an ASIC intention to issue a direction, through a court or the Administrative Appeals Tribunal (AAT), before a direction is issued.

The Insurance Council's response to the Consultation Paper questions, as well as a fuller outline of our recommendations, are contained in the **attachment**.

If you have any questions or comments in relation to our submission, please contact John Anning, the Insurance Council's General Manager Policy, Regulation Directorate, on (02) 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director & CEO

ATTACHMENT – Consultation Paper Questions

POSITION 1

Position 1: ASIC should have the power to direct financial services licensees in the conduct of their business where necessary to address or prevent compliance failures

1. Should ASIC be able to give a direction to a financial services or credit licensee requiring them to take or refrain from taking specified action in the conduct of their business where necessary to address or prevent compliance failures?

The Insurance Council agrees that ASIC should have powers which are sufficient to address compliance failures, but we note that ASIC's existing powers are already extensive in this regard.

Under the *Corporations Act 2001* (the Corporations Act), ASIC can regulate and modify the conduct of a licensee by applying for an injunction. An injunction utilises the court process in providing a check on the sufficiency of proof to warrant urgent and potentially invasive action.¹ The Consultation Paper suggests the injunction process is time consuming, but does not appear to have considered ASIC's existing ability to seek an interim injunction pending determination of the main application for an injunction. An interim injunction can be obtained in urgent circumstances and has the advantage that a court assesses the brief evidence and the need for urgency before making a determination. If there are barriers to the use of interim injunctions, then perhaps those barriers should be addressed and if appropriate, overcome.

Nevertheless, we acknowledge that in circumstances where there is sufficient evidence and legal grounds for ASIC to take action, there may be benefit in a less litigious environment for ASIC to compel a licensee to take or cease action. However, empowering ASIC to make directions must be balanced by sufficient checks and balances built into the legislation to ensure the powers are used appropriately. Absent these checks and balances, the Insurance Council is not supportive of the proposed directions powers.

The Insurance Council is concerned that the proposed directions powers are not sufficiently targeted and substantially diminishes procedural fairness afforded to licensees. The legislative framework should be clear that the directions powers could only be used where:

- ASIC has conducted surveillance and has first-hand information from the licensee;
- a full assessment of the facts and circumstances have been conducted;
- the licensee has been informed of ASIC's concerns and has been given the opportunity to respond; and
- the use of other ASIC powers have been considered.

¹ Section 1324(2) of the Corporations Act.

An ASIC direction can have significant repercussions for a licensee before proof of any misconduct has been established to a court or in a prior hearing with ASIC. If ASIC's powers were to be expanded as proposed, the Insurance Council recommends that the following procedural fairness measures are incorporated into the legislation:

- (i) **Preliminary notice:** ASIC should be required to give a preliminary notice to the licensee outlining the facts of the alleged breach. This notice should be highly prescriptive giving significant detail around what the breach is, sections of the Act, alleged behaviours and supporting evidence to enable the licensee to understand ASIC's concerns.
- (ii) **Licensee response:** Following the preliminary notice, licensees are provided an opportunity to respond, which also allows the licensee to correct any errors in the facts presented.
- (iii) **Notice of intent:** Before a direction is issued, ASIC should be required to provide a notice of intention to issue a direction. Legislation should prescribe that the licensee can seek an injunction or dismissal in the AAT based on this notice of intention before the direction is issued. Importantly, the licensee should be afforded 28 days to take action before ASIC can issue the direction. This is necessary to enable the licensee to investigate the matter and obtain legal advice as appropriate.

The preliminary notice process we recommend should ensure that ASIC only issues directions following proper investigation, and failure to strictly adhere to this notification process should be grounds for the licensee to not comply with any future notice. The ability of a licensee to challenge an ASIC decision to issue a notice (as per step (iii) above), prior to the notice being issued, is critical. Reputational harm to the licensee would be difficult to avoid once an ASIC direction has been issued, even if subsequently overturned by a court or AAT.

We believe these additional safeguards would enable ASIC to take timelier action. These measures would only introduce court or AAT oversight in instances where the licensee disagrees with ASIC's assessment of an alleged breach.

It is also preferable that any new directions powers are accompanied by a requirement for ASIC to have sufficient evidence, and form a reasonable view on that evidence, that the use of such powers are warranted in a particular circumstance. The Insurance Council's view is that the directions power should only be available for serious contraventions of the law, and not for minor or technical non-compliance.

2. Should the directions ASIC can make be prescribed in the legislation (with an ability to extend the list by regulation)? If so, is the above list appropriate?
3. Alternatively, should a directions power be drafted broadly to allow for a wider variety of direction?

The Insurance Council's preference is that a list of possible directions be clearly prescribed in legislation with reviews scheduled at pre-determined intervals to ensure ASIC's regulatory objectives continue to be met in the most efficient and effective manner possible. This would provide licensees and ASIC with clarity regarding the parameters of the directions power.

The existence of broad powers runs the risk that ASIC uses such powers as a default tool of regulatory intervention in preference to other powers where due process and other protections are incorporated into the use of those powers. Powers that are broadly defined could also potentially result in regulatory action other than to enforce the law, for example, to require changes consistent with ASIC's view on how a licensee's business should be run. Such a blurring of enforcement powers with business management interventions is not appropriate and we suggest that any directions powers be limited to enforcement of the law.

The Insurance Council recommends that any prescribed directions be linked to ASIC establishing a failure or refusal by a licensee to comply with the law. Where a licensee is authorised to provide financial services on more than one product, any direction should be limited to those financial services with respect to which the breach relates. We do not support the enabling of an extension of the list by regulation, as such directions should not be changeable and should be determined by Parliament given the potential consequences of the powers.

POSITION 2

Position 2: The directions power should be triggered where a licensee has, is or will contravene financial services requirements (including relevant laws)

4. Should the directions power be triggered if ASIC has reason to believe that a licensee:
 - a. has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes, or would constitute a contravention of a law relevant to the provision of services by the licensee?
 - b. has refused or failed, is or is proposing to refuse or fail to do an act or thing that the legislation requires a financial services or credit licensee to do?
5. Alternatively, should broad public interest considerations or objectives provide the basis for ASIC making a direction? If so, are the objectives outlined above appropriate?

The Insurance Council submits that the directions powers should only be triggered by a contravention of relevant laws. We are not supportive of a broad criteria for making a direction which includes "proposed" conduct that would constitute a contravention of a law.

Providing such a trigger for the directions power raises practical issues around how ASIC would establish that a licensee "proposes" to engage in misconduct. We note that all of the case study examples provided in the Consultation Paper are in relation to actual or alleged misconduct, rather than misconduct that has not yet occurred.

Given the directions power is intended to enable ASIC to take quick action once it has established that non-compliance has occurred, the Insurance Council submits that it is sufficient for the directions power to be triggered if ASIC has reason to believe that a licensee has engaged or is engaging (rather than proposing to engage in) misconduct. A direction should only be triggered once ASIC has engaged with the licensee, and the licensee is refusing to comply with the law.

The Insurance Council is not supportive of the alternative approach, outlined in the Consultation Paper, of broad public interest considerations providing the basis for ASIC

making a direction. While the public interest considerations outlined by the Taskforce are consistent with ASIC's objectives under its constituting legislation, the breadth of a public interest consideration as a trigger for the exercise of the powers would create uncertainty for licensees.

POSITION 3

Position 3: ASIC should be able to apply to a court to enforce the direction and take administrative action if an AFS licensee does not comply with a direction

6. Should ASIC be able to apply to a court to seek an order requiring a licensee to comply with the direction?
7. If so, should there be sanctions, in addition to those relating to contempt, for a licensee and/or its directors if the licensee breaches the court order?

To ensure procedural fairness, the licensee must also be permitted to dispute the validity of ASIC's direction in Court.

8. Should failure to comply with an ASIC direction be a:
 - a. criminal offence?
 - b. civil penalty provision?
 - c. breach of a financial services law or credit legislation and therefore a basis for administrative action?

The Insurance Council agrees with the Taskforce's preliminary view that a criminal prosecution would be a disproportionate response to a failure to comply with an ASIC direction. We note that a serious contravention of the law itself will fall under the criminal penalty regime, regardless of whether the licensee complies with ASIC's direction. Application of criminal penalties, as well as civil penalties, would be particularly inappropriate for a contravention of the law that has not yet occurred or alleged misconduct that has yet to be determined or is disputed.

As noted in the Consultation Paper, a licensee that breaches a court order requiring compliance with an ASIC direction would be in contempt of court and liable to further sanctions. Failing to comply with a court order could provide the grounds for an automatic suspension or cancellation of the licence and directors could also be subject to automatic disqualification. This would provide sufficient deterrence for non-compliance with an ASIC direction.

9. Should ASIC be required to give written notice to a licensee before making a direction setting out: its intention to make a direction, reasons and a period of time for the licensee to respond that is reasonable in the circumstances?
10. Alternatively, should ASIC be required to offer the affected licensee an opportunity to appear, or be represented at a hearing and to make submissions on the matter before making a direction? If so, should ASIC also be able to make an interim direction without providing a hearing and be required to provide a hearing within a certain time frame?

Yes, ASIC should be required to provide notice to the licensee prior to issuing a direction; however, the Insurance Council recommends the process as outlined in our response to question 1.

In relation to the alternate proposition, we note that an interim direction pending a hearing could still result in damage before the licensee is able to defend itself. For example, a stop order direction could cause serious damage, including reputational damage, and interruption in the interim, in addition to adverse customer impact. A hearing may find that a stop order was not justified in the circumstance or that a stop order of smaller magnitude was warranted.